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**IDAHO PERSONNEL COMMISSION**

**STATE OF IDAHO**

VIRGINIA STACEY,

Appellant-Respondent

vs.

IDAHO DEPARTMENT OF LABOR,

Respondent-Petitioner.

IPC NO. 95-04

**DECISION AND ORDER ON  
PETITION FOR REVIEW**

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on March 13, 1998. Appellant-Respondent Virginia Stacey (Stacey) was represented by William L. Mauk, Esq. Respondent-Petitioner Idaho Department of Labor (Department) was represented by Michael S. Gilmore, Deputy Attorney General. By order of the Commission, the matter was submitted for decision on the briefs.

The petition for review involves a request for an interlocutory review of the hearing officer's orders of July 17, 1997 and November 12, 1997 compelling the Department to disclose certain information. We decline to accept jurisdiction of this petition for review and DISMISS FOR LACK OF JURISDICTION.

**I.**

**BACKGROUND AND PRIOR PROCEEDINGS**

**A. Facts.**

On January 3, 1995, the newly appointed director of the Department of Employment (now Department of Labor) issued a declaration of “Fiscal Emergency/Reorganization and Reduction in Force.” As a result of the reorganization and reduction in force a number of positions were abolished, including all but one position in the Personnel and Training Bureau. Stacey was one of the employees laid off in the Personnel and Training Bureau.

Stacey filed a grievance regarding the layoff. The impartial review panel questioned the imminence of a fiscal emergency and suggested that the Department reconsider its layoff decision with regard to Stacey. The director affirmed his earlier decision, and Stacey was laid off effective March 17, 1995.

**B. Appeal to Personnel Commission.**

Stacey filed a timely appeal to the Commission. The matter was referred to a hearing officer (Michael Day). The parties engaged in discovery, including written interrogatories, requests for production of documents and depositions. Stacey sought to discover material which the Department believed was not subject to disclosure, either because the information was not relevant, or was privileged. Stacey filed a motion to compel the Department to produce the requested materials.

On July 17, 1997, the hearing officer entered an order compelling the Department to comply with Stacey’s discovery requests. The Department then filed a motion asking that the hearing officer reconsider the order compelling discovery. With one minor exception, the Department’s motion was denied on November 12, 1997.

On December 2, 1997, the Department filed its Petition for Agency Review of Hearing Officer’s Orders Compelling Disclosure of Certain Information with the Commission. A similar petition was filed concurrently in the district court with a request that the district court stay its

proceedings until the Commission had acted. At about this time, the hearing officer, Michael Day, resigned due to health considerations. The matter was reassigned to Ray Durtschi, and the hearing which was to have been held at the end of January was vacated pending resolution of the discovery issues.

## II.

### ISSUES

#### **A. Issues Raised By the Department.**

The Department presents the following issues for Commission review. For ease of reference, the issues are quoted verbatim from the Department's petition.

- (a) Should a grievance appeal from agency action to reorganize an agency, abolish unnecessary positions, declare a fiscal emergency, reduce the work force and lay off personnel (the agency action) be decided under an objective standard of whether the stated reasons objectively support the action?
- (b) Is it presumed as a matter of law that there is good cause against compulsion of testimony or discovery of high ranking government officers in a grievance appeal?
- (c) Is there good cause in a grievance appeal against the compulsion of testimony or discovery of the director's mental processes before reaching a decision to take the agency action?
- (d) Is there good cause in a grievance appeal against the compulsion of testimony or discovery of the director's deliberative processes before reaching a decision to take the agency action?
- (e) Is there a constitutional separation-of-powers requirement of an executive mental processes and/or deliberative processes privilege attaching to high-ranking officers before they reached a decision to take agency action?
- (f) Does Idaho Code §§ 9-203 5 create a statutory privilege of confidential communications in a grievance appeal that applies to the director's and the director-designee's communications generally made by or to him concerning his prospective decisions without formal invocation of the privilege?
- (g) Should the agency be required to disclose materials covered by the attorney-client or attorney-work product privilege in a challenge to the agency action in a grievance appeal?

(h) In a grievance appeal, must the agency provide the names and certain additional personnel information of every person rehired by the agency (except seasonal workers) since the agency action was taken, and must it list every position that has been filled by the agency on a full-time, part-time or temporary basis since the agency action was taken?

(i) In a grievance appeal from the agency action, is a former employee entitled to the personnel evaluations of other employees, both before and after the action was taken?

**B. Jurisdictional Issue.**

Preliminary to reaching the issues stated above, the Commission must address a question of first impression: Does the Commission have jurisdiction to review a hearing officer's ruling on a pre-hearing discovery matter?

**III.**

**STANDARD AND SCOPE OF REVIEW**

The issues before the Commission in this proceeding are issues of law. The Commission exercises free review over matters of law, and “may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).” *Soong v. Idaho Dep’t of Health and Welfare*, IPC No. 94-03 (February 21, 1996), *aff’d* Case No. CV 96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted).

#### IV.

#### ANALYSIS

##### **A. Jurisdictional Issue.**

##### **1. *Relevant Statutory Provisions.***

The Department argues that the Commission has jurisdiction to entertain its petition for review pursuant to Idaho Code §§ 67-5307 (4) and/or 67-5316 (8).

Any department aggrieved by any action or inaction of the Commission shall be afforded an opportunity for a hearing before the Commission upon request therefor in writing. Minutes or summary of the proceedings of all hearings shall be made and filed with the Commission, together with findings of fact and conclusions of law made by the Commission.

Idaho Code § 67-5307 (4).

. . .The decision of the hearing officer shall be final and conclusive between the parties, unless a petition for review is filed with the Commission within thirty-five (35) days. The petition for review shall specifically cite the alleged errors of fact or law made by the hearing officer.

Idaho Code § 67-5316 (8).

We believe that other applicable provisions include Idaho Code § 67-5316 (5), relating to appeals, which states that “[p]rocess and procedure under this act shall be as summary and simple as reasonably may be;” and Idaho Code § 67-5317 which establishes the process for petitions for review:

If a petition for review is filed, the Commission shall review the record of the proceeding before the hearing officer, briefs submitted in accordance with any briefing schedule it orders, and any transcripts submitted of the hearing below. The Commission may grant the parties the opportunity to present oral argument but need not do so if the record clearly shows that the Commission or the hearing officer lacks jurisdiction over the appeal or petition for review. The Personnel Commission may affirm, reverse or modify the decision of the hearing officer, may remand the matter, or may dismiss it for lack of jurisdiction.

## ***2. Application of Statutory Provisions.***

As discussed above, the issue of the Commission's jurisdiction to hear an interlocutory appeal from a decision of the hearing officer is raised for the first time in this proceeding. There are no relevant judicial decisions to assist the Commission in deciding the issue. The statutory provisions governing appeals and petitions for review do not include an explicit grant of interlocutory jurisdiction.

Idaho Code § 67-5307 (4) provides an opportunity to seek relief for those who may be aggrieved by decisions of the Commission. The hearing officer is an agent of the Commission, and pursuant to Idaho Code § 67-5316 (8), hearing officer decisions are final for appellate purposes. It is true that anyone who does not prevail in a preliminary matter of dispute before the hearing officer could be "aggrieved" in the general sense of the word. We do not believe, however, that such circumstances give rise to a right of interlocutory appeal.

The statutory provisions governing appeal procedures specifically provide that the "[p]rocess and procedure under this act shall be as summary and simple as reasonably may be." Idaho Code § 67-5316 (5). During the course of an appeal, a hearing officer may issue any number of decisions and orders to advance the appeals process. Such orders might pertain to discovery, briefing schedules, hearing dates, or other procedural issues. If every such decision were appealable to the Commission, the appeal procedure would be neither summary nor simple. The delay in getting appeals to a hearing where a decision could be made on the

merits could be excessive. The time and cost of pursuing appeals under such a scenario would surely discourage appellants from seeking the review and redress to which they may be entitled.

We believe that Commission participation in the proceedings before the hearing officer is also inconsistent with the statutory scheme that delineates and separates the appeal process and the petition for review process. An appeal and a petition for review are two different processes, with different purposes and different standards of review. The proceedings before the hearing officer provide the forum for getting at the merits of an appeal, including fact-finding, credibility determinations, and the creation of a record and a decision. In matters involving discipline, the hearing officer must determine whether the state has proved its case by a preponderance of the evidence. On petition for review, the Commission considers the record, transcripts, and briefing in order to determine whether the hearing officer's findings and conclusions are supported by substantial, competent evidence. When the Commission begins inserting itself into the process before the hearing officer, the appeal process and the petition for review process become inextricably entwined, defeating the statutory scheme and obviating the purpose of having a hearing officer handle appeals.

Finally, this Commission recognizes that the issues raised by the Department in its petition have implications and application beyond this particular case. Resolution of the issues raised by the Department involve interpretation and application of rules and statutes that are beyond the purview of this Commission. We believe that the courts are the appropriate venue for a thorough consideration of the legal and policy issues involved in resolving these issues. Because the Department sought review concurrently before this

Commission and the district court, deferring to the court's jurisdiction will not create additional delays and may ultimately result in a more timely determination of these important issues.

**B. Issues Raised by Department.**

Because we decide this matter on the preliminary jurisdictional issue, it is unnecessary to address the particularized issues raised by the Department in its petition.

**V.**

**CONCLUSION**

For the reasons set out above, we do not believe that Idaho Code §§ 67-5316 and 67-5307 confer jurisdiction on this Commission to hear interlocutory appeals from intermediate decisions of the hearing officer. The Department's petition for review is dismissed for lack of jurisdiction.

**VI.**

**STATEMENT OF APPEAL RIGHTS**

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the Commission has acted without jurisdiction or in excess of its powers;



(3) That the findings of fact by the Commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 10th day of April, 1998.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION

/s/\_\_\_\_\_  
Sherry Dyer, Chair

/s/\_\_\_\_\_  
Peter Boyd

/s/\_\_\_\_\_  
Ken Wieneke

/s/\_\_\_\_\_  
Don Miller

/s/\_\_\_\_\_  
Dale Tankersley

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Decision and Order on Petition for Review in *Stacey v. Dep't of Labor*, IPC No.95-04, was delivered to the following parties by the method stated below on the 10th day of April, 1998.

#### **FIRST CLASS MAIL**

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/s/\_\_\_\_\_  
Val E. Rodriguez